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No. 07-1387

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IN THE

Supreme Court of the United States

STROMAN REALTY, INC.,
Petitioner,

v.

SAM WERCINSKI,
Commissioner of the Department of Real Estate
for the State of Arizona,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

There is confusion among the courts of appeals and the district courts regarding the proper standard to apply when assessing whether the exercise of personal jurisdiction is appropriate over non-resident public officials in Section 1983 actions. Some circuits apply the long-arm jurisdiction statutes of the forum state with a Fourteenth Amendment due process analysis while others engraft extra requirements in addition to the standards set forth in the applicable state long-arm statute. There is also disagreement among the circuits as to whether, in a federal question case, a Fourteenth or a Fifth Amendment due process analysis, or any due process analysis at all, should ensue following a determination that jurisdiction exists under the state long-arm statute.

The questions presented for review are as follows:

1. Whether the same personal jurisdictional analysis should apply in a case against a non-resident public official as that applied in a case against a non-resident private litigant, or whether additional minimum contacts should be imposed where the defendant is a state official.
2. Whether the due process analysis of the Fifth Amendment rather than the Fourteenth Amendment should apply in assessing long-arm jurisdiction in a federal question case where the state long-arm statute requirements are met.
3. Whether any due process analysis is required after state long-arm criteria are met if the federal claim is against a public official acting in his official capacity when states have no due process rights.

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I. THE COURT SHOULD ESTABLISH THE TEST TO APPLY IN DETERMINING WHETHER JURISDICTION OVER STATE OFFICIALS IN § 1983 ACTIONS COMPORTS WITH DUE PROCESS.

There is a split among the circuits on whether the *Calder*[1] effects test applies in § 1983 actions. There is also disagreement on the proper application of the *Calder* test including the type of intent required.

[1] *Calder v. Jones*, 465 U.S. 783 (1984).

This case is an appropriate vehicle to resolve these questions.

A. The Court Should Provide the Framework for Assessing Jurisdiction in § 1983 Actions.

1. *Whether § 1983 Actions Should Be Treated as Torts in Actions Against Officials Acting in Their Official Capacity.*

The court unequivocally held that a *Kulko*[2] analysis applied in this § 1983 action rather than the purposefully directed tort test of *Calder*. App. 13a. *See also Stroman Realty, Inc. v. Antt*, 528 F.3d 382, 386 (5th Cir. 2008) (applying doing business analysis). To excuse this deviation, the Commissioner asserts that "because § 1983 actions are treated as torts for some purposes" does not mean that "they must invariably be treated as torts for purposes of the personal-jurisdiction inquiry." Opp. 22. Whether a § 1983 case against an official in her official capacity constitutes a tort likewise troubled the court but it did not reach the issue. App. 8a. The court nonetheless found the *Calder* test inapplicable. *See* App. 13a.[3] In contrast, other circuits have applied a tort analysis using *Calder* or a similar torts-based test in § 1983 actions. *See* Pet. 14; *Trujillo v. Williams*, 465 F.3d 1210, 1220 (10th Cir.

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[2] *Kulko v. Superior Court*, 436 U.S. 84 (1978).

[3] Unlike *Wercinski*, *Kidwell* declined to apply *Kulko*, reasoning that the "actions of Idaho's officials" were analogous "to the tort of intentional interference with a commercial relationship." *Great W. United Corp. v. Kidwell*, 577 F.2d 1256, 1268 (5th Cir. 1978), *rev'd on venue grounds sub nom., Leroy v. Great W. United Corp.*, 443 U.S. 173 (1979).

2006) (court considered *Calder* effects test but declined to find jurisdiction over Virginia prison officials in New Mexico because all relevant conduct by the Virginia defendants occurred in Virginia where prisoner was housed).

This distinction makes a difference. The nature of the underlying case must be considered in determining which due process framework applies. *See Miller Yacht Sales, Inc. v. Smith*, 384 F.3d 93, 104 (3d Cir. 2004) ("'there are different considerations in analyzing jurisdiction over contract claims and over certain tort claims.'") (citation omitted) (noting distinctions between the due process totality of the circumstances test applied in contract cases and the effects test applied in intentional tort claims); *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1071 (10th Cir. 2008) (in tort context the court examines whether defendant "'purposefully directed'" its acts at forum state and in contract cases whether defendant "'purposefully availed' itself of privilege of conducting activities or consummating a transaction in the forum state."). The Court should address this question to provide necessary guidance to the courts in assessing jurisdiction under § 1983 including whether a tort analysis applies to actions against state officials acting in their official capacity.

2. *The Circuits are Divided in the Application of a Commercial Benefit Criterion in § 1983 Cases.*

To avoid the circuit split, the Commissioner claims that the court simply used the *Kulko* economic benefit test because the facts of the underlying case differ from those § 1983 actions where *Calder* was applied. Opp. 18-19. A comparison of the allegations

in those cases with the Fifth Circuit here and Sixth Circuit in *Griepentrog*[4] reveals that in both types of cases the conduct was alleged to be damaging to the plaintiff, illegal and unconstitutional. Nonetheless, the Fifth and Sixth Circuits determined that a different jurisdictional standard should apply if the claim arises out of the enforcement of state or federal law. *See* App. 15a (stating that the Commissioner's intent for her activities "is to uphold and enforce the laws of Arizona."); *Griepentrog*, 954 F.2d at 1178 (stating that "defendants have acted in accord with federal law and these actions do not give rise to personal jurisdiction."); *see also Hannon v. Beard*, 524 F.3d 275, 281 (1st Cir. 2008)[5] (rejecting defendant prison official's *Wercinski*-based argument that personal jurisdiction was lacking because his activities were not "commercial", stating that the

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[4] As the Commissioner acknowledges, *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 954 F.2d 1174 (6th Cir. 1992), like the Fifth Circuit, did not apply *Calder* and determined that purposeful availment did not exist because "[t]he defendants have never solicited business in Michigan" and "[t]he defendants' states have undertaken no economic activity in the state of Michigan in relation to the disposal sites." Opp. 17; *Griepentrog*, 954 F.2d at 1177.

[5] As in *Grand River Enterprises Six Nations, Ltd. v. Pryor*, 425 F.3d 158 (2d Cir. 2005), the First Circuit in *Hannon* declined to apply an economic benefit criterion to the jurisdictional analysis. *Hannon*, 524 F.3d at 280. The reason *Hannon* addressed commercial activity is because the plaintiff alleged the "transacting business" prong of the state long-arm statute applied. *See id.* at 281. Treating plaintiff's § 1983 claims as a tort, the court found that personal jurisdiction comported with due process because the claims arose from the official's contact with Massachusetts in that the injury alleged would not have occurred but for the official's transfer arrangements, the transfer to Massachusetts constituted purposeful availment and jurisdiction was otherwise reasonable. *Id.* at 282-85.

action in *Wercinski* "attacked the validity of that law" and therefore *Wercinski* was inapplicable).[6]

Thus, the only feature distinguishing *Wercinski* and *Griepentrog* from other § 1983 cases is that the cause of action arose out of the state officials' enforcement activity as opposed to an official's individual misconduct. Other circuits, however, have not found that this distinction compels application of the commercial benefit test. *See* Pet. 19-21. Although the Commissioner writes off *Grand River*'s and *Kronisch*'s[7] lack of an economic benefit factor in assessing personal jurisdiction merely as a function of the facts in those cases, (Opp. 19-21), there is no basis for that assertion and the cases present no less a conflict with cases that articulate and apply this element.

If the nature of the case fits within the *Calder* tort analysis there is no reason to shop for additional criteria that can never be met in either an individual or official capacity case under § 1983. The question for the Court to resolve is whether the official capacity distinction justifies the application of a completely different jurisdictional standard.

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[6] The First Circuit's characterization of Stroman's complaint is inaccurate. Stroman requested injunctive relief based on Arizona's attempt to apply its real estate licensing and related laws to a Texas business and transactions occurring entirely outside of Arizona in violation of the commerce clause. App. 47a, 60a-62a.

[7] *Kronisch v. United States*, 150 F.3d 112 (2d Cir. 1998).

B. This Court Should Settle the Disagreement Among the Circuits on Whether Intent to Harm is a Necessary Component of the *Calder* Effects Test.

There is a division among the circuits on the nature of the intent required by *Calder*. The Court should settle the question of whether "wrongful" intentional conduct must be alleged. *Compare Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 433 F.3d 1199, 1207-08 (9th Cir. 2006) (en banc) (rejecting French associations' argument that "they have done no more than vindicate their rights under French law, and that their behavior therefore has not been wrongful", instead applying *Calder* and analyzing the associations' "contacts with California relating to [their] dispute with Yahoo!, irrespective of whether they involve wrongful actions . . . .") and *Dudnikov*, 514 F.3d at 1072-73 (noting the conflict but not reaching the issue) *with Marten v. Godwin*, 499 F.3d 290, 297 (3d Cir. 2007) (intentional act aimed at the forum must be tortious).

To avoid the split, the Commissioner and the court again rely on a purported distinction between the § 1983 cases which apply the *Calder* effects test and official capacity cases based on the intent of the defendant official. There is no basis in this Court's precedent for a special intent standard for official capacity cases. The Commissioner asserts, however, that an official's actions in enforcing state laws "simply do not establish that an official intended to inflict serious harm or injury or that serious harm or injury was likely to follow from the official's actions."[8]

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[8] *See* Opp. 8 (distinguishing *Ziegler v. Indian River County*, 64 F.3d 470 (9th Cir. 1995), and other cases relied on by Stroman,

Opp. 7. Although the court agreed, other circuits have not imposed a heightened intent standard. *See James v. York County Police Dep't*, 160 Fed. Appx. 126, 134-35, 2005 WL 3313029, at *6 (3d Cir. 2005) (Pennsylvania district court had jurisdiction over California narcotics officer under effects test based on officer's call to Pennsylvania Attorney General's office, sending a package to that office and testifying against plaintiff at a preliminary hearing because the "[officer's] allegedly tortious acts were intended to have an impact on [plaintiff] in Pennsylvania.").[9]

The Commissioner proffers no rationale why unconstitutional conduct performed in an official capacity justifies application of a different intent test than that applied in a suit against a state official in his individual capacity. Indeed, it is doubtful that the state officials sued in their individual capacities had any more "intent" when failing to check fingerprints or arresting the wrong person than the Commissioner did here when she unconstitutionally imposed Arizona regulations on Stroman's business in Texas and required Stroman to conform to Arizona law even when the transactions did not involve Arizona residents. *See Dudnikov*, 514 F.3d at 1077 (noting that defendants in *Calder* were focused on selling newspapers, "not in doing *intentional* harm" to plaintiff but that defendants in *Dudnikov* "*intended* to cause the cancellation of plaintiffs' auction . . . ."). The Commissioner certainly intended

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asserting that the officials in those cases "intended to" or were "at least highly likely to cause harm or injury in another forum, and the plaintiffs were seeking to recover damages for the harm or injury that the officials had caused.").

[9] Nor did the Tenth Circuit in *Trujillo*, an official capacity case, refer to such a requirement. *Trujillo*, 465 F.3d at 1220.

Stroman to modify its conduct to conform to Arizona law. *See Kidwell*, 577 F.2d at 1267 (Idaho officials' regulatory efforts "forseeably changed the [plaintiff's] actions" and that "[t]hese effects, effects with substantial consequences on important business plans" were "more than sufficient to satisfy the minimum contacts requirement.").

While assessment of personal jurisdiction turns on the facts of each case, at a minimum, litigants need to know which analysis applies. In short, does the *Calder* effects test require that the acts directed at the forum be tortious and does a heightened intent standard apply in an official capacity case.

C. The Reasonableness Criteria Asserted by the Commissioner Do Not Support Denial of Certiorari.

The Commissioner highlights the court's concern that finding jurisdiction could "subject any state official enforcing his State's laws to suit in any State where the validity of his State's laws was questioned". Opp. 26. Such a result is unlikely at best. Indeed, other circuits have rejected such concerns. *See Hannon*, 524 F.3d at 283 (court determined exercising jurisdiction would not have this effect because "the harm alleged was directly tied to the contacts establishing personal jurisdiction" and the plaintiff's "claim arises directly from [the official's] contacts with Massachusetts."). *See also* Pet. 22.

Similarly, the federalism concept asserted by the Commissioner and the court as a basis for denying jurisdiction in this case makes no sense in the context of Stroman's case which involves a federal constitutional violation. Indeed, *World-Wide Volkswagon*

v. Woodson, 444 U.S. 286 (1980), relied on by the court and the Commissioner, was a diversity case, not a federal claim. Issues of state sovereignty, however, have little pertinence to a commerce clause claim—a question of national concern and the preservation of an economic union. *See, e.g., Granholm v. Heald*, 544 U.S. 460, 472 (2005). If anything, federalism concerns support jurisdiction in Texas. *See Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984) (noting a state's "especial interest in exercising judicial jurisdiction over those who commit torts within its territory."). Likewise, the court's concern with a multiplicity of inconsistent verdicts (App. 18a) will be magnified, not reduced, by forcing Stroman or other similarly situated plaintiffs to go to each separate jurisdiction whose officials seek to exert their regulatory power extraterritorially on citizens of other states.

II. THE COURT SHOULD DETERMINE WHETHER A FIFTH OR FOURTEENTH AMENDMENT DUE PROCESS ANALYSIS APPLIES IN A FEDERAL QUESTION CASE.

The Commissioner asserts Stroman waived the issue of whether a Fifth versus a Fourteenth Amendment due process analysis applies in a federal question case. Opp. 33. *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 127 S.Ct. 1199 (2007), and *Fry v. Pliler*, 127 S.Ct. 2321 (2007), relied on by the Commissioner do not support her argument. In those cases, the Court refused to consider certain issues because the litigants had not raised them in the petitions for certiorari and the issues were irrelevant to the questions presented. *See Travelers*, 127 S.Ct. at 1207 n.5 (declining to consider appellee's

argument that "was not raised in PG&E's brief in opposition to certiorari, and bears no relation to the question presented."); *Fry*, 127 S.Ct. at 2327 (declining to consider argument "not fairly encompassed within the question presented" and for which the Court granted certiorari and was only briefly referenced in the petition for certiorari). In contrast, here, the Court has discretion to consider the issue because it is addressed in the petition for writ of certiorari and fairly encompassed in the issue of when personal jurisdiction may be exercised over state officials. *See PGA Tour, Inc. v. Martin*, 532 U.S. 661, 678 & n.27 (2001); *Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 245 n.2 (2000).

Application of a Fourteenth Amendment limitation requiring contacts with the forum ignores the constitutional distinction between the federal claims asserted by Stroman and a diversity case. As the court noted in *U.S. v. Swiss Am. Bank, Ltd.*, 274 F.3d 610 (1st Cir. 2001), "[t]his distinction matters because under the Fifth Amendment, a plaintiff need only show that the defendant has adequate contacts with the United States as a whole, rather than with a particular state. . . . At the same time, however, the plaintiff must still ground its service of process in a federal statute or civil rule." *Swiss Am. Bank*, 274 F.3d at 618 (citations omitted). *But see Stroman Realty, Inc. v. Antt*, 528 F.3d 382 (5th Cir. 2008) (reversing finding of jurisdiction over the state officials of Florida and California based on inquiry limited to the reach of the Fourteenth Amendment's Due Process Clause because § 1983 lacks a provision for service of process). If statutory service requirements are met, however, there is no reason to impose such a limitation on a federal court's

jurisdiction in a federal question case. *See* Pet. 27-30. The Court should grant certiorari to answer the question of whether a Fifth Amendment due process analysis applies in a federal question case where service is effected under a state long-arm statute.

III. THE COURT SHOULD DETERMINE WHETHER A PUBLIC OFFICIAL ACTING IN HIS OFFICIAL CAPACITY SHOULD BE TREATED AS A PERSON FOR PURPOSES OF THE DUE PROCESS CLAUSE.

This Court has never addressed the extent and application of the "fiction" permitting suits against public officials in their official capacities. In *Kidwell*, the court determined that even in official capacity cases the official is treated as a person for all purposes because his unconstitutional conduct stripped him of any immunity. *Kidwell*, 577 F.2d at 1265. The court here, however, raised the question whether a public official should be considered a "person" in a case permissible under the *Young*[10] fiction. App. 8a. While it makes sense to treat the official as a "person" for purposes of the long-arm statute, it does not follow that a due process analysis should apply when the suit is, in reality, an action against the State. *See* Pet. 32.

The Commissioner asserts, however, that if the due process analysis is discarded in a *Young* type case, the case automatically becomes an impermissible suit against the State. Opp. 34 (relying on *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506

[10] *Ex parte Young*, 209 U.S. 123 (1908).

U.S. 139 (1993)).[11] *Metcalf & Eddy*, however, stands for no such proposition. What that case stands for is that, unless a suit falls within the *Young* exception, the state is immune from suit and that denial of immunity is immediately appealable. The Commissioner offers no reason why the *Young* fiction should be extended beyond Eleventh Amendment immunity onto Fifth and Fourteenth Amendment due process analyses for personal jurisdiction. As the Commissioner admits, the underpinning of the personal jurisdiction requirement is the *individual* liberty interest of the due process clause. Opp. 29. As such, it has no bearing on whether jurisdiction should be asserted over a state official acting in his official capacity. The Court should grant certiorari to answer the question of whether any due process analysis applies in the first instance.

CONCLUSION

For the foregoing reasons and those set forth in Stroman's Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[11] The Commissioner's assertion of waiver with respect to this argument should be rejected for the reasons set forth in Part II, *supra*.